IN THE

Supreme Court of the United States

October Term, 1969

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No. 1508

DIANA KEARNY POWELL,
Petitioner,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES,
Respondent.

DIANA KEARNY POWELL,
Petitioner,

v.

JOHN MITCHELL, United States Attorney General,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL,
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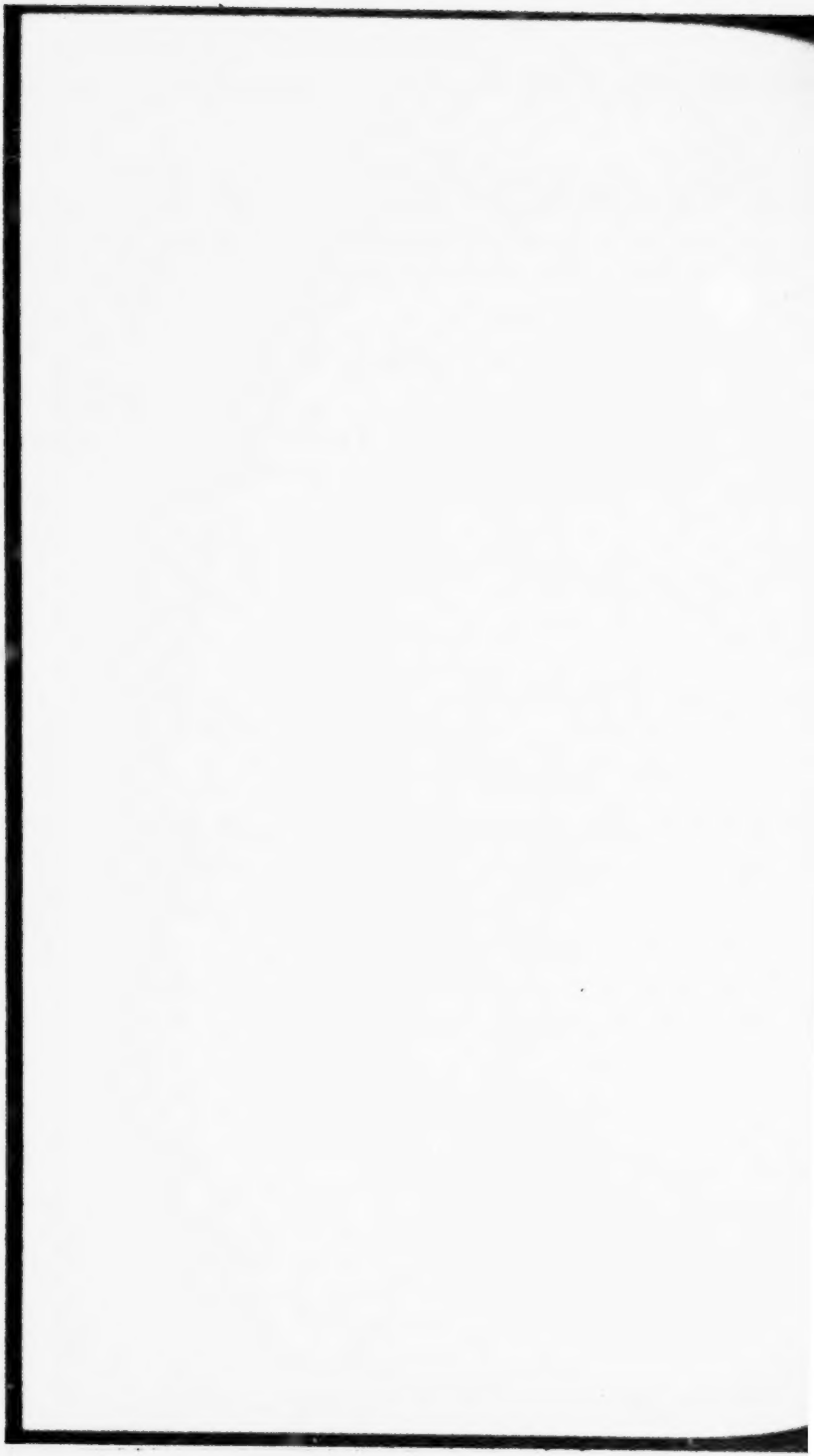

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(b) The right to practice law is in the nature of a property right within the meaning of Amendments Five and Fourteen, and is protected by the right to due process and equal protection of the laws	12

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(c) This Court has ruled that State regulation of professional conduct of attorneys may not be used to infringe personal and public rights. The integrity of the federal bar requires a decision extending the same rule to regulation of professional conduct before the United States Courts. 13

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The discretionary power of the Attorney General to select which cases are to be prosecuted under the Federal Criminal Code does not extend to complete rejection without consideration of substantial proffered evidence, to the extent of depriving individuals or segments of the public of equal protection of the law, a point which has not been, but should be determined by this Court 15

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COMMITTEE ON ADMISSIONS AND GRIEVANCES,

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JOHN MITCHELL, United States Attorney General,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Diana Kearny Powell respectfully prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered without opinion, in each of the above-entitled proceedings on December 11, 1969.

OPINIONS BELOW

No opinion was rendered in either case in the United States District Court for the District of Columbia. No opinion was entered in either case in the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered in each case December 11, 1969 (a1, a2). Timely petitions for rehearing, with suggestion for rehearing *en banc* were denied in each case February 3, 1970 (a3, a4), and this petition for certiorari is filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner in 1965 filed a Complaint in the nature of Mandamus directed to the Attorney General seeking criminal prosecution against a bank and two attorneys for fraud and embezzlement of trust property as revealed by court records, and naming as accessories two judges whose opinions aided the fraud by misstatement of material facts of record and citations, which factual errors they refused to correct, after being informed of the error. The questions presented are:

1. Does disbarment by a federal court on the sole ground that this complaint was filed, and summary denial of reinstatement sought on grounds of new evidence, set a precedent by which regulation of the Bar by disbarment –

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(a) becomes a pretext to abridge individual and public rights to free speech and petition for the redress of wrongs protected by Amendment One of the Constitution of the United States?

(b) Destroy a right in the nature of property rights (to continue in the practice of law) protected by Amendments Five and Fourteen of the Constitution of the United States?

(c) Conflict with principles established by this Court inhibiting use of State regulation of professional conduct of attorneys to infringe individual and public rights under Amendment One of the Constitution? *Brotherhood of R.R. Trainmen v. Virginia State Bar* (Va. 1964), 84 S.Ct. 1113, 377 U.S. 1, 12 L.Ed.2d 89, rehearing den. 84 S.Ct. 1625, 377 U.S. 960, 12 L.Ed.2d 505.

2. Does the arbitrary exercise by the Attorney General of the discretionary power to select or reject substantial evidence of violation of the federal criminal code, presented in the form of a Complaint in the nature of mandamus, and Motion to reopen on the grounds of new evidence violate individual and public rights to petition under Amendment One of the Constitution, and the equal protection of the law guaranteed by Amendments Five and Fourteen of the Constitution:

CONSTITUTIONAL AMENDMENTS

Constitution of the United States:

Amendment One. Congress shall make no law . . . abridging the freedom of speech or of the press, or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment Five. No . . . nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Amendment Fourteen. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Proceedings:

Powell v. Committee on Admissions and Grievances, in the Court below Case No. 23,196, In re Diana Kearny Powell, sought to be reviewed in this Court on petition for writ of certiorari, originated as a motion to reopen disbarment proceedings and to reinstate petitioner Powell as a member of the District of Columbia Bar on grounds of new evidence and error in the earlier proceedings violating Constitutional rights of free speech and petition, and of due process of law and equal protection of the laws, Misc. No. 54-65 in the United States District Court for the District of Columbia. Disbarment was entered after hearing and the filing of trial briefs, on April 7, 1966, upon the finding and judgment of the District Court that the original Complaint in the nature of

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Mandamus (the original complaint filed in the case joined in this Petition and more fully described below) seeking criminal action by the Attorney General against a bank and two attorneys, and joining as accessories two judges, was false, scurrilous, and without foundation in fact. Timely appeal taken to the United States Court of Appeals for the District of Columbia Circuit (No. 20,181, resulted in affirmance filed January 12, 1967, the unreported opinion leaving an option to reinstate, petition for certiorari to this Court denied May 8, 1967, 386 U.S. 1055, rehearing denied June 12, 1967, 388 U.S. 924.

Motion for reinstatement filed June 20, 1967, summarily denied by United States District Court for the District of Columbia, June 26, 1967, affirmed on appeal in case No. 21,220 in the Court of Appeals, December 22, 1967, petition for certiorari denied June 17, 1968, 392 U.S. 928, petition for rehearing denied October 14, 1968. (No. 1200 in this Court, Oct. Term, 1967). The instant action, Motion filed May 13, 1969, and summarily denied without hearing by Order striking the Motion for reinstatement and directing its physical return to the movant, June 3, 1969, Notice of Appeal filed June 5, 1969 with Motion for immediate transmission of the record to the Court of Appeals. June 18, 1969, Memorandum and Order impounding the record and ordering the documents stricken, the record transmitted to the United States Court of Appeals for the District of Columbia Circuit by order of that Court entered July 25, 1969, after the case had been docketed in that Court, June 23, 1969. Motion to dismiss filed by the Committee August 8, 1969, Opposition and Motion to Strike Motion to Dismiss filed August 15, 1969. Order dismissing appeal was entered December 11, 1969, (a1) timely Motion for rehearing with suggestion for rehearing *en banc* filed December 26, 1969, was denied February 3, 1970, (a2).

Subsequent disbarment in the United States Court of Appeals for the District of Columbia Circuit (Misc. 108), No. 974, Oct. Term 1967, in this Court, certiorari denied, rehearing denied, 1968, was entered automatically, after notice and opposition, (request for oral argument ignored), were entered automatically on the grounds of

disbarment in the District Court; and suspension in this Court was entered automatically under Rule 8 of the Rules of this Court. Opposition has been filed. Request for hearing has not been acted upon. Misc. 882.

Powell v. Mitchell, In the Court below Case No. 23,247 (originally *Powell v. Katzenbach* in the United States District Court for the District of Columbia), sought to be reviewed in this Court on petition for certiorari, originated as a motion to reopen on grounds of new evidence raising a question of violation of Constitutional rights of free speech and petition, and of equal protection of the laws, Civil Action 207-65. The original Complaint filed in the District Court, January 26, 1965 (which is the ground for the judgment of disbarment noted above), was dismissed on motion granted over opposition, March 8, 1965; on appeal duly taken (No. 19,285) to the United States Court of Appeals for the District of Columbia Circuit, judgment of the District Court was affirmed, December 9, 1965, 123 U.S. App. D.C. 250, 359 F.2d 234 (1965), certiorari denied 384 U.S. 906 (1966), rehearing denied 384 U.S. 967.

The instant motion to reopen and amend, filed June 10, 1969, was summarily denied without hearing, June 11, 1969, by fiat. It was duly appealed to the United States Court of Appeals for the District of Columbia Circuit, Notice of Appeal filed June 11, 1969. Motion for summary affirmance was granted over opposition and the appeal summarily dismissed without hearing and without opinion, December 11, 1969 (a3). Rehearing was denied February 3, 1970 (a4).

Facts:

The original complaint in the nature of mandamus in *Powell v. Katzenbach,* in pertinent part, alleged:

> "2. The National Savings and Trust Company . . . acting as Successor Trustee of the estate of Diana Kearny Powell, deceased, Administration No. 12657 in this Court by appointment and as officer of the United States District Court for the District of Columbia in Civil Action No. 4051-55, Lucy Powell v. Diana Kearny Powell, Owen Bullitt

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Powell and George Cuthbert Powell, within the meaning of 18 U.S.C. 645, and acting through its attorney Henry H. Paige and in conspiracy with Benjamin W. Dulany representing the executors of Lucy Powell, deceased, knowingly and willfully, and for the purpose of obstructing justice, defrauding the remainderman Diana Kearny Powell, for the purpose of retaining it in their own custody, and to convert it to the estate of Lucy Powell, deceased, by means of misrepresentation of the facts of record and perverting the law, and further,

"3. The Honorable Judge Alexander Holtzoff . . . knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,

"4. The Honorable Judge Warren Earl Burger . . . in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 16,071, in the United States Court of Appeals for the District of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of

justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings."

In regard to the two judges, the alleged grounds for disbarment, the trial brief included an appendix of relevant documents, with a second appendix giving a detailed analysis of numerous errors of fact appearing in the opinions, cross-referencing the opinions line by line with the undisputed record, showing such material misstatements as the date of death of Respondent Diana Powell's father, on which her vested right as a substituted remainderman in being and capable of taking at termination of the trust by the death of Lucy Powell depended, confusing the remaindermen with trust beneficiaries, and confusing the testamentary trustee with the beneficiaries. In testimony at the trial of the disbarment, Judge Holtzoff declined to testify on grounds of privilege, except to identify the proceeding and deny the truth of the allegation, followed by an unsolicited vindictive outburst. It is suggested to the Court that Judge Holtzoff has since gone to his reward. Judge Burger testified, stating that he would not have appeared except under subpoena, denied the truth of the charges, but on cross-examination testified that he had not looked at the opinion since writing it several years before, but that at the time he had believed it to be true, indicating that he had relied on the opposition to bring errors to his attention.

It is clear from the record that the best evidence, the documentary records on which Petitioner relied, were completely disregarded in both cases sought to be reviewed, and that the unsupported statements of counsel

were relied on by the Court, that counsel for the bank and for the Executors of the estate of Lucy Powell were fully aware that they were misleading the Court and insinuating errors of fact into the record. Malicious intent is inferred from the refusal of the two judges to correct plain error after it was brought to their attention. *Lucy Powell v. Diana Kearny Powell, Owen Bullitt Powell, George Cuthbert Powell,* (C.A. 4051-55), on appeal, *Diana Kearny Powell v. National Savings and Trust Company et al.,* 111 U.S. App. D.C. 290, 296 F.2d 412, certiorari denied 368 U.S. 946, 7 L.Ed.2d 343, 82 S.Ct. 387, (1961) rehearing denied 368 U.S. 1005, 7 L.Ed.2d 547, 82 S.Ct. 547 (1962), 114 U.S. App. D.C. 296, 314 F.2d 274 (1963), 379 U.S. 920, (1964), rehearing denied, 379 U.S. 984 (1965), 384 U.S. 938, rehearing denied 384 U.S. 1027, 86 S.Ct. 1019 (1966), 390 U.S. 957, rehearing denied 390 U.S. 1037 (1968). Attention is directed to several other related cases omitted to avoid confusion. *First Camden National Bank and Trust Company v. Diana Kearny Powell, et al.,* now pending on appeal in the Superior Court of New Jersey, Appellate Division, Docket No. A-1180-69, *Powell v. First Camden National Bank and Trust Company.*

New evidence presented as grounds for reopening is the active part of attorneys for the bank and their associates in the appointment and confirmation of some six persons involved in these and related cases, particularly of the appointment of Roger Robb, Esq., member of the Committee prosecuting the disbarment, to the United States Court of Appeals, and of Chief Justice Burger, and the exclusion of Petitioner from the Senate hearings on confirmation, as additional evidence of collusion and to suppress rights protected by Amendments One, Five and Fourteen of the Constitution.

REASONS FOR GRANTING THE WRIT

POINT ONE

(a) This Petition should be granted because the facts and proceedings clearly show that disbarment, and denial of the motion to reinstate was used, not because of misconduct or to protect the integrity of the courts, but to thwart Petitioner's complaint against the bank and attorneys, thus depriving her of rights of free speech and petition under the First Amendment of the Constitution.

The record clearly shows that Petitioner has at all times maintained an attitude of respectful cooperation and candor with the Court in the best traditions of the Bar and in the best interests of the administration of justice through the Courts. She has said and done nothing which she is not prepared to support with the record, and has relied entirely on the undisputed record.

Disbarment because of paragraphs Three and Four of her formal Complaint in the nature of Mandamus is a red herring to divert attention from the criminal implication of the bank and two attorneys, having prominent connections capable of influencing judicial appointments, and who did actively influence judicial appointments and confirmation.

It is not only Petitioner's right under Amendment One to inform the proper authorities of crimes against the federal Code, but it is her duty to do so, most especially when it involves color of misconduct of members of the Bar exerting undue pressures upon the Court.

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The errors of fact are matters of record, indisputable, and in the particulars, undisputed. These errors have been recognized by the New Jersey court in a case involving the conversion of the realty, *First Camden National Bank and Trust Company v. Powell, et al., supra.*

Paragraph Three, relating to Judge Holtzoff's involvement, is moot. Petitioner respectfully suggests the death of Judge Holtzoff. Further, it is generally understood that his judgment and faculties have been for a number of years impaired by age, a consideration in evaluating his vindictive outburst in the disbarment proceeding, as well as his instantaneous self-reversal of his off-the-cuff opinion pursuant to subtle needling by Mr. Dulany, an associate of the chairman of the Bar Association's judicial appointment committee, Mr. Edmund Campbell.

Paragraph Four, relating to Judge Burger, now Chief Justice of the United States and of this Court, like paragraph Three, ties responsibility to the refusal to correct material errors after being informed. Judge Burger testified that he had not looked at the record in the Powell case since writing the opinion, and that he believed the statement of facts to be correct, that he relied upon the opposition to direct his attention to error. The question remains why he did not check the record on Petitioner's repeated motions and appeals. Petitioner would be more than happy to withdraw that paragraph, upon the simple act of good faith and judicial integrity of correcting plain and indisputable error. In the meantime, this has not been done, and Mr. Campbell and others involved were conspicuously present at the confirmation proceedings in the appointments of both Judge Burger and Judge Robb, (who had urged the disbarment) in the case of Judge Robb after urging his appointment. At the same time,

Petitioner was excluded from these hearings, although she had duly sought opportunity to testify.

Petitioner submits that it is a matter of pressing national concern that disbarment should be used to blackmail her into silence. Whether or not full investigation would produce an actionable criminal case against any or some of the persons complained of, substantial documentation supported the Complaint, and it was Petitioner's right and duty to make that complaint without fear of reprisal. This much is afforded under Amendment One even for doubtful statements under doubtful causes. A formal complaint stating the facts of an alleged crime and directed to the courts and the Attorney General is certainly within that right.

The Duke and Fletcher cases, cited by the Committee, are not in point, since neithr involve the right of petition under Amendment One.

Petitioner submits the Petition should be granted as to the review of the disbarment on the ground it has been used to abridge the right to petition the Courts and the Attorney General for prosecution of crime, in violation of rights preserved by Amendment One.

> (b) The right to practice law is in the nature of a property right within the meaning of Amendments Five and Fourteen, and is protected by the right to due process and equal protection of the laws.

The right to practice law is a substantial right protected by Amendments Five and Fourteen of the Constitution as to requirements of due process and equal protection of the laws. This Court has so held, and implies

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due process, that is, the right to have the issues determined upon facts of record, and not upon argument of counsel unsupported by evidence. The right is not to be destroyed at the whim of the court granting it. This Court held:

> " . . . In no case has it been considered that the power to disbar is an arbitrary or despotic one to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility." *Ex parte Bradley*, 7 Wall (U.S.) 364, 19 L.Ed. 214.

The fact that individuals, including some judges, may be embarrassed by the exposure of facts which at the least raise a question of propriety, and strongly indicate involvement in crime, does not warrant suppression of those facts to impute professional misconduct in the attorney having the temerity to make a complaint on the basis of them.

Petitioner submits that the unfounded accusation that her complaint addressed to the Attorney General was false and unfounded, violate her rights to due process and equal protection of the law. See *Dillon v. U.S.*, (D.C. Or. 1964), 280 F.Supp. 487, reversed on other grounds 346 F.2d 633.

> (c) This Court has ruled that State regulation of professional conduct of attorneys may not be used to infringe personal and public rights. The integrity of the federal bar requires a decision extending the same rule to regulation of professional conduct before the United States Courts.

This Court has ruled that a State may not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way upon the right of individuals and the public to due process of law and the right to be heard. *Brotherhood of R.R. Trainmen v. Virginia, ex rel. Virginia State Bar* (Va., 1964), 84 S.Ct. 1113, 377 U.S. 1, 12 L.Ed.2d 89, rehearing denied 84 S.Ct. 1625, 377 U.S. 960, 12 L.Ed.2d 505.

If the right applies to State action as in the cited case to labor relation rights, the facts of the disbarment here under review warrant even more the consideration of this Court. The most basic right of the public as well as of the individual is to be protected from crime by the Government. Implicit in this right is the freedom to bring before appropriate authorities the facts concerning crimes of which they have been the victim without fear of duress from the courts and authorities to whom they apply for redress.

It is submitted that even a substantiated complaint of professional misconduct may not be used to suppress the complaint of crime made in good faith to the Attorney General. Even more, it is a violation of basic rights under Amendment One when disbarment is used to repress the well-substantiated complaint of crime against the federal criminal code when the sole ground for disbarment is the generalized and unsupported accusation that the written description of the crime is scandalous and unfounded.

Petitioner submits that the question is significant, and should be determined by this Court.

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POINT TWO

The discretionary power of the Attorney General to select which cases are to be prosecuted under the Federal Criminal Code does not extend to complete rejection without consideration of substantial proffered evidence to the extent of depriving individuals or segments of the public of equal protection of the law, a point which has not been, but should be determined by this Court.

The Complaint in the nature of Mandamus has never been checked for substantiating evidence supporting the allegations of criminal conduct which it contains. Instead, it was arbitrarily rejected and branded as false and scandalous, notwithstanding substantial documentary support readily available. The embezzlement and fraud that is the subject of the complaint involves substantial property rights which have been converted from the proper owner by means of trick, deception, and fraud on the Court, perfectly discernable when one puts aside the reams of irrelevant paper and circumlocutions.

While it is fully agreed that the Attorney General has discretion in the proper enforcement of the federal criminal law, that discretion is not without limits. It definitely does not authorize the Attorney General to choose at whim to enforce the law in one instance, and in another where his friends may be involved to ignore it completely. Such spotty exercise of discretion leaves the application of criminal law unsettled and deprives the victim of crime of the equal protection of the law, not only in its application to the individual, but in its wider effect upon the public. Such exercise of the discretionary power leaves

the cabinet officer as well as the courts open to every kind of political and financial pressure when the rights of the average individual are aligned against the self-interest of the large corporation, the influential lawyer or client, or the wealthy.

This is certainly the situation presented by the second petition sought.

Petitioner submits that the second writ of certiorari should be granted to define the limits of the discretionary power of the Attorney General between lawful authority and abuse.

Grant of certiorari is also necessary for the proper consideration of the case joined in this petition.

CONCLUSION

For the reasons stated, it is respectfully submitted that a writ of certiorari should issue to review each of the judgments of the United States Court of Appeals for the District of Columbia Circuit here sought to be reviewed.

DIANA KEARNY POWELL

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Petitioner pro se

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APPENDIX

UNITED STATES COURT OF APPEALS
for The District of Columbia Circuit

[Filed December 11, 1969]

No. 23,196 September Term, 1969
Misc. 54-65

In the Matter of:

Diana Kearny Powell,
Appellant.

Before: Bazelon, Chief Judge; and Fahy, Senior Circuit Judge; and Robinson, Circuit Judge, in Chambers.

ORDER

On consideration of the motion of the Committee on Admissions and Grievances for the United States District Court for the District of Columbia to dismiss this appeal or to summarily affirm the order of the District Court on appeal herein and of appellant's opposition thereto and appellant's motion to strike the aforesaid motion of the Committee on Admissions and Grievances, and on consideration of the original and supplemental records on appeal herein and of appellant.s brief, it is

ORDERED by the Court that the order of the District Court appealed from herein be and it is hereby affirmed.

Per Curiam.

Chief Judge Bazelon did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
for The District of Columbia Circuit

[Filed December 11, 1969]

No. 23,247 September Term, 1969
Civil Action 207-65

Diana Kearny Powell,
Appellant,

v.

John Mitchell, United States
Attorney General.

Before: Bazelon, Chief Judge; and Fahy, Senior Circuit Judge; and Robinson, Circuit Judge, in Chambers.

ORDER

On consideration of appellee's motion for summary affirmance, of appellant's opposition and on consideration of the original record on appeal herein and appellant's brief in support of her appeal, it is

ORDERED by the Court that the order of the District Court appealed from herein be and it is hereby affirmed.

Per Curiam

Chief Judge Bazelon did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
for The District of Columbia Circuit

[Filed February 3, 1970]

N. 23,196 September Term, 1969
Misc. 54-65

In the Matter of:

Diana Kearny Powell,
Appellant.

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge; Robinson, Circuit Judge; in Chambers.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

Chief Judge Bazelon did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
for The District of Columbia Circuit

[Filed February 3, 1970]

No. 23,247 September Term, 1969
Civil Action 207-65

Diana Kearny Powell,
Appellant,

v.

John Mitchell
United States Attorney General

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge; Robinson, Circuit Judge; in Chambers.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

Chief Judge Bazelon did not participate in the foregoing order.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1508

DIANA KEARNY POWELL, PETITIONER

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES AND JOHN MITCHELL, United States Attorney General

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, IN OPPOSITION

Several years ago, petitioner brought an action against the Attorney General of the United States seeking a writ of mandamus directing him to institute criminal proceedings against a national bank and certain individuals who allegedly had embezzled and converted property for the purpose of defeating petitioner's remainder interest under her grandmother's

will. The court of appeals affirmed the dismissal of the action and this Court denied certiorari. *Powell* v. *Katzenbach*, 359 F. 2d 234 (C.A. D.C.), certiorari denied, 384 U.S. 906, rehearing denied, 384 U.S. 967.

Thereafter, invoking Rule 60(b)(2) of the Federal Rules of Civil Procedure, petitioner sought to reopen her complaint on the ground of newly discovered evidence. Petitioner pointed to the substitution of Attorney General Mitchell in place of former Attorney General Katzenbach as defendant and asserted that the Chief Justice of the United States (then a judge of the Court of Appeals for the District of Columbia Circuit), Mr. Justice Marshall and Charles E. Duncan (until recently Corporation Counsel of the District of Columbia) had obtained personal reward for their part in an alleged conspiracy against petitioner. The district court declined to reopen the complaint and the court of appeals summarily affirmed (Pet. App. A-2).

Further review by this Court is not warranted. Leaving aside the inadequacy of petitioner's alleged newly discovered evidence to support her charges of misconduct by public officials, the legal insufficiency of her attempt to compel the Attorney General to institute criminal proceedings remains. As the court of appeals correctly held on petitioner's earlier appeal (359 F. 2d at 234-235), whether and when a criminal prosecution is to be instituted is a matter within the discretion of the Attorney General and mandamus will not lie to control the exercise of this discretion.

The petition should, therefore, be denied.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

[1] Petitioner also seeks review of an entirely independent order of the court of appeals with respect to the disbarment proceedings which were instituted against her (Pet. App. A-1). The federal government was not a party to those proceedings.

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Supreme Court of the United States

October Term, 19[illegible]

No. 1,908

FILED

JUL 8 1970

DIANA KEARNY POWELL,

Petitioner,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES,

Respondent.

DIANA KEARNY POWELL,

Petitioner,

v.

JOHN MITCHELL,
United States Attorney General,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL
1900 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Petitioner, pro se

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Supreme Court of the United States

October Term, 1969

No. 1,508

DIANA KEARNY POWELL,

Petitioner,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES,

Respondent.

DIANA KEARNY POWELL,

Petitioner,

v.

JOHN MITCHELL,
United States Attorney General,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Diana Kearny Powell respectfully prays this Court for an order (1) vacating its denial of the petition

for writ of certiorari, entered on June 8, 1970, in the above-entitled cases, and (2) granting the petition. As grounds for reconsideration, petitioner states the following:

INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

1. Involvement of the Chief Justice should not preclude, and in fact should be cause for, his participation in granting rehearing.

The Chief Justice did not participate in the denial of the petitions for writ of certiorari, presumably because of his involvement in both cases.

In the disbarment proceeding he was a witness against respondent Powell, although, he admitted, a reluctant one. On the basis of his testimony as to his recollection, which she was not permitted to test against the documentary records on which she relied, she was unjustly found guilty of professional misconduct in filing the complaint to the Attorney General that he had aided fraud in basing a decision on false statements of fact, and refusing to review and correct the plain error.

The Chief Justice has no personal interest in the disbarment. Presumably, he has a proper interest in truth, justice and the correction of gross miscarriage of justice, particularly when it is a consequence of his own error.

As Chief Justice, as Circuit Judge of the Circuit in which the erroneous decisions were made, and as the judge writing the opinion in which the errors of fact appeared – dates of death and precise wording of documents and decisions are not debatable matters susceptible of judicial interpretation – he has the authority and the special obligation to correct the error and injustice to which he has contributed. Petitioner submits

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that the precedent for participation in the granting of certiorari under the circumstances is established in *Bartkus v. Illinois,* 355 U.S. 281, 356 U.S. 969, 359 U.S. 121, and in *Ladner v. United States,* 355 U.S. 282, 356 U.S. 969, 358 U.S. 169.

Petitioner points out that the abstention of the Chief Justice leads to the inference that the errors and the refusal to review and correct them were and still are intentional. There is no possible *bona fide* question as to the errors, which are too plain to be explained away, even by the most inventive circumlocutions. Petitioner can very well understand, although she does not condone, the reluctance of judges of lower courts and of members of the bar to confront the Chief Justice with the provocative question of why he continues to refuse to correct injustices committed by him.

The Chief Justice cannot wash his hands of this responsibility or cover the errors with judicial robes. God is not mocked and truth speaks for itself. If the Chief Justice has been acting through honest error, it will be his wish as well as his duty to exercise his authority to call for review and correction of the injustice for which he is responsible. Until that is done, it stands as a blot upon an otherwise exceptionally outstanding and clean record.

2. **The Chief Justice has the obligation to cease permitting the use of his involvement as a shield for fraud.**

In respect to the action in the nature of mandamus directed to the Attorney General, the interest of the Chief Justice, which it is assumed is the cause for his abstention, is that he is named as aiding the fraud of a bank and two attorneys. The sole involvement of the Chief Justice is his failure to correct error and the inference that his silence connotes intent. It is pointed out

that his involvement, commencing in lack of candor and subtle deception of the court by the attorneys complained of, has been used to shield them from the prosecution of their fraudulent acts. His failure to take part in consideration of the petition, or for reconsideration, suggests he has an interest in suppressing prosecution.

The Chief Justice is in a position to use his office and particular relationship to the case as an instrument of justice rather than as a shield for crime. Petitioner respectfully points out that he has the authority and the special obligation to disassociate himself from the fraud by correcting the errors induced by misleading statements of counsel, and to review or to act *sua sponte* on the mandamus.

Petitioner respectfully suggests that this positive action would clearly be in the interest of justice and respect for the courts and law, and would be in the highest traditions of judicial detachment and objectivity.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writs of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgments of the courts below.

Respectfully submitted,

DIANA KEARNY POWELL

1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Petitioner, pro se

CERTIFICATE OF GOOD FAITH

Petitioner Diana Kearny Powell hereby certifies that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2).

DIANA KEARNY POWELL